That being, in my view, the only possible construction to place upon this passage in the Arabic will, I think that authority is conclusive that the whole disposition is void. I refer to the following passage from the Lord Chancellor's Judgment in *Hunter v. Attorney-General*[7] :—

"It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made in the will, so that the whole might be applied for either purpose, the whole bequest is void, and I do not understand any of the judges of the Court of Appeal to question that doctrine."

It seems to me that that passage exactly fits the disposition which is under consideration. In my opinion this disposition is void.

In regard to prayer 3 of the Summons there will be an order in terms.

Prayer 4 is adjourned.

Order accordingly.

MUSA BIN YUSOF v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson and Briggs, JJ.) January 27, 1953]

[K.L. — F.M. Criminal Appeal No. 111 of 1952]

Penal Code — Right of self-defence — Limit of.

This appeal explains the proper limits of the right of self defence under the Penal Code which makes "the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence."

The appellant in this case had been convicted of culpable homicide not amounting to murder. It was clear after the summing up by trial Judge that the assessors accepted the appellant's story that he was first attacked by the deceased with a piece of iron and that by the time he struck the fatal blow the same piece of iron has passed from the deceased's possession into his own possession.

The question was then at issue was whether after disarming the deceased of the piece of iron, the appellant was justified in going further than is necessary to defend himself.

Held: following **Alingan Kunhinayan & Anor. v. The Emperor**[1], the law in this country gives greater latitude to a person who is attacked than does the law in England. The question in such cases is not whether there was an actual continuing danger, but whether there was a reasonable apprehension of such danger. If such a condition exists, the person attacked is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable.

Case referred to :—

(1) *Alingan Kunhinayan & Anor. v. The Emperor,* I.L.R. 28 Mad. 454.

COURT OF APPEAL, CRIMINAL.

M. S. Mahendran for the appellant.

G. H. Summerfield (D.P.P.) for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by :—

Mathew, C.J. : — In this case the appellant was convicted of culpable homicide not amounting to murder, and was sentenced to three years rigorous imprisonment. There are two accounts of what happened on the evening when the deceased received the blow from which he subsequently died. The prosecution witnesses state that the appellant made an unprovoked attack on the deceased, while the appellant and his witnesses state that it was the deceased who attacked the appellant without warning.

It is significant, as the learned trial judge pointed out, that no evidence was given by the prosecution witnesses as to how the appellant came to receive the serious injuries that were in fact inflicted on him. What is quite clear is that certain of the injuries inflicted on the appellant and the fatal injury inflicted on the deceased were all caused by the same instrument, an iron trident, which could be used as an anchor for a small fishing boat. The appellant's defence was that he did no more than exercise his right of private defence, and that the blow he inflicted on the deceased was, in all the circumstances of the case, justified.

The learned trial judge in a full and careful summing-up set out the three conclusions to which the assessors might come. It is convenient to examine what the learned trial judge said :—

"If the blow is struck in self-defence, then, subject to what I am going to tell you in a minute or two, no offence is committed. Or again, if two people get into a fight and in the course of the fight which has been unpremeditated fatal blows were struck, then the killing is not murder. It is then not murder but culpable homicide not amounting to murder or what the law in England calls manslaughter.

Coming to the first question of self-defence, Counsel have told you that every man is entitled to defend himself. But that right is subject to very substantial limits. In particular in connection with this case I am going to read you something from the Penal Code:—

"The right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence."

Now, gentlemen, I am not taking the question from you, but you will remember that even on the prisoner's own story that he was attacked with the iron, by the time he struck the blows the iron had passed from the deceased's possession into his own possession, and I think it is very very difficult to say that once he had the iron and when he went on to strike blows with it he was acting in self-defence because, however the incident started, at that stage of the proceedings the Imam was unarmed and the prisoner was in possession of a very

very dangerous weapon and so, gentlemen, I think you will find it very, very difficult to say that in striking the Imam with the iron he was striking in pursuance of the right of self-defence.

But, gentlemen, even if he went further than exercising his right of private defence he may well be guilty of something less than murder. He may be guilty of culpable homicide not amounting to murder and that of course is for you to say. You can look at it, the law looks at it, on one of two ways. If a man is attacked and if in self-defence he goes further than is necessary to defend himself and kills the attacker that is manslaughter.

Then again, if two persons get into a fight and in the course of the fight a fatal blow is struck, again that is manslaughter.

And so in practice in this case you will have to decide whether the killing amounted to murder or manslaughter and that will depend on whose story you accept."

It is quite clear from this passage that the learned trial judge left to the assessors the three alternative opinions of murder, culpable homicide not amounting to murder and acquittal. But in the passages which follow (in his summing-up) he repeated more than once that in his opinion there was, on the evidence, no alternative but murder or culpable homicide not amounting to murder.

It is, we think, clear from the opinions the assessors gave that they did not accept the story of the prosecution witnesses in its entirety and came to the conclusion that it was the deceased who started the fight. It was most important, bearing in mind that the appellant's defence was a plea of private defence, that the law on the question of private defence should be fully explained to the assessors, in particular the law regarding this right when the attacker had been disarmed and the weapon had passed from the attacker to the attacked.

The law in this country gives greater latitude to a person who is attacked than does the law in England. In England, if self-defence is to be successful, the attacked must attempt to disengage himself from the attack, and his killing the assailant is only excuseable if there was no other way of saving his life. The law which is applicable in this country is fully set out in *Alingan Kunhinayan & Anor. v. The Emperor*[1]. The learned Sessions Judge in that case made the following observation :—

"It is urged on behalf of the first accused that he was justified in the exercise of his right of private defence of his person in stabbing deceased when he attacked him with a knife. First accused had undoubtedly a right to defend himself but I think it is clear that he exceeded the right of private defence which he possessed. First accused was certainly not justified in wresting the knife from deceased and inflicting a dangerous wound in the chest. There is no reason, I think, to suppose that first accused could not have escaped further injury by resorting to less violence or by running away. It was not necessary for first accused's own preservation that he should have inflicted such grievous bodily harm."

The Court of Appeal commented on this passage as follows :—

"On the facts of the case we cannot agree with the view of the law taken by the learned judge. We do not think it can be said that the first accused exceeded the right of private defence. The learned judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But, this is placing a greater restriction on the right of private defence of the body than the law requires.

The principle applicable to a case like this is that laid down by Mayne:

> "But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, when the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The all important facts in connection with the question whether the first accused exceeded the rights of private defence of his body when he gave the stab with his knife which proved fatal to the deceased, are that the deceased was the first to use the knife and had inflicted a wound on the first accused which might well have proved fatal.

On the facts we are of opinion that the first accused did not exceed the right of private defence and that his conviction under section 304 and 326 of the Indian Penal Code cannot be upheld."

Accepting, as the assessors must have done, that it was the deceased who first attacked the appellant, we cannot but feel that, had the assessors been directed that if they believed that the one blow which the appellant gave to the deceased with the trident was for the purpose of preventing a renewed attack upon him, he was entitled to acquittal, the assessors might well have come to a different conclusion.

We consider that this appeal should be allowed. The conviction is accordingly quashed, the sentence set aside, and the appellant ordered to be released.

Appeal allowed.

In re ESTATE OF JOHN WALKER, DECD. MORRIS EDGAR v. Mrs. MARY ELIZABETH JUDSON.

[C. A. (Mathew, C.J., Sir Charles Murray-Aynsley, C.J. (S) and Briggs, J.) February 11, 1953]

[K.L. — F.M. Civil Appeal No. 66 of 1952]

Limitation — Civil Law Enactment, 1937, s. 4(iii)(b).

The question raised by this appeal is whether the limitation period of six months prescribed by section 4